No. 16632

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EZEQUIAL FRANK LOPEZ VASQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

An Indictment was presented and filed on March 4, 1959, by the Federal Grand Jury for the Southern Division of the Southern District of California while sitting at San Diego, charging Appellant and another in one count with a violation of Title 21, United States Code, Section 176(a), occurring on or about February 5, 1959, in the Imperial County, within said Division and District. [C. T. 2.][1]

Jurisdiction of the District Court is found in Section 3231 of Title 18, United States Code. Thereafter judgment of conviction of Appellant upon his plea of guilty was entered on May 26, 1959, and on June 4, 1959, Appellant filed notice of appeal from the judgment of conviction. [C. T. 35.] This Court has jurisdiction of the

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[1]"C. T." refers to Clerk's Transcript of Record.

cause under the provisions of Sections 1291 and 1294 of Title 28, United States Code, and Rules 37(a)(2) and 39 of the Federal Rules of Criminal Procedure.

II.

Statement of Facts.

Appellant and his codefendant Jose Quinones Hernandez were arraigned on March 16, 1959, on the Indictment which charged concealment of marihuana after illegal importation. [C. T. 3.] An attorney was appointed for Appellant and a plea of not guilty was entered thereafter by Appellant, as well as by his codefendant, on the date of arraignment. [C. T. 3.] On March 24, 1959, Appellant, on motion of his counsel, changed his plea to guilty and at the same time the case was set for jury trial on April 21, 1959, as to his codefendant. [C. T. 5; R. T. 2.][2] The pertinent proceedings on the change of plea are as follows:

> "Mr. Leeger: As to Mr. Vasquez, your Honor, we would like to move to withdraw our plea of Not Guilty for the purpose of entering a new plea . . .
>
> The Court: How old are you, Vasquez?
>
> Defendant Vasquez: 21.
>
> The Court: Is that what you would like to do, withdraw your plea of Not Guilty and change your plea to that of guilty? Is that what you want to do?
>
> Defendant Vasquez: Yes, sir.
>
> The Court: Is that free and voluntary on your part?
>
> Defendant Vasquez: It is free and voluntary on my part.

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[2]"R. T." refers to Reporter's Transcript of Proceedings.

The Court: Is that you feel that you want to change your plea because you are guilty or for some other reason?

Defendant Vasquez: Well, because I am guilty, your Honor.

Mr. Leeger: You understand what you are charged with here; right?

Defendant Vasquez: I understand.

The Court: You understand this is a charge that under the law the punishment provided is not less than five years? You understand that?

Defendant Vasquez: (Affirmative nod.)

The Court: The Court must impose a minimum sentence. Is that the—

Mr. Leeger: Well, no, your Honor. I understand that being under 22 this man has—your Honor has the option of treating him as a youth offender. Am I correct in that?

The Court: Wait a minute. Let me see. This is concealment, illegal concealment of marihuana. Is that the one?

Mr. Leeger: Yes.

The Court: After illegal importation. Title 21, U. S. C. 176(a).

Mr. Hughes: That carries mandatory penalties, however, your Honor. The defendant is under 22 years of age. If the Court elects he may be treated as a youth offender.

The Court: Yes, that is correct. However, that is what the law provides. But the situation is as counsel has stated. I am not committing myself as to just what will be done.

Mr. Leeger: I realize that, your Honor. I wanted to make sure I had not misinterpreted the law. I realize this is within your discretion. You understand too, Mr. Vasquez?

Defendant Vasquez: I understand.

The Court: There is a privision of the law that people of a certain age, as in the age of this young man, may have consideration of the Court as youth offenders. That is correct, isn't it Mr. Hughes?

Mr. Hughes: Yes, your Honor, that is true.

The Court: But, as I say, I am not making any commitment. I never commit myself as to what I will do.

Mr. Leeger: I realize that. We are not asking you to commit yourself at this time, your Honor.

The Court: Has anyone made you any promise or any representation that if you would plead Guilty, the Court would give you consideration for that reason?

Defendant Vasquez: No, sir.

The Court: You may proceed with the change of plea."

The indictment was then read to Appellant and he pleaded guilty.

Thereafter, a jury trial was commenced on April 28, 1959, as to the codefendant Hernandez. [C. T. 11.] On April 29, 1959, after a jury had been called and impaneled, a motion was made in behalf of said codefendant to suppress evidence which was denied. [C. T. 13.] Appellant testified for the codefendant at the hearing of said motion on April 29, 1959 [C. T. 13], and at the

trial on April 30, 1959 [C. T. 15], which concluded in a verdict of guilty as to the codefendant on May 1, 1959. [C. T. 16.] Appellant was represented by his counsel who was present at the time of his respective pleas and during portions of the subsequent proceedings when Appellant testified for codefendant. [C. T. 30.]

On May 13, 1959, twelve days after the verdict as to the codefendant, the motion to vacate the plea of guilty as to Appellant was filed. [C. T. 19.] Appellant stated in an affidavit filed May 21, 1959, in support of motion to vacate entry of plea of guilty that "his recollection of the events in connection with said search and seizure were confused and unclear," because he was "extremely nervous, upset and confused" at the time of the alleged illegal search and seizure and he concluded that he "therefore was not able to provide his attorney with an accurate picture of said events." [C. T. 24.] Affiant continued that it was not until "he was informed of testimony offered at the trial of his codefendant, Jose Quinones Hernandez, that various important phases of said search and seizure reoccurred to him, and it was not until after that his attorney was informed of these facts"; and further concluded that because his attorney did not receive a clear picture of these facts his attorney was unable to adequately advise him and represent him in this matter. [C. T. 24.]

Said motion to vacate plea of guilty was denied on May 22, 1959. [C. T. 33; R. T. 7.]

The Trial Court found at that time as follows: "The defendant arraigned was represented by competent counsel, and the facts show that *he not only pleaded guilty*

voluntarily but that he testified as to such guilt on two occasions with the knowledge of his counsel, and that both counsel and defendant were under no misapprehension as to the facts of the seizure of the evidence herein." [R. T. 7.] (Emphasis added.)

Thereafter the defendant was sentenced to imprisonment for a period of five years. [C. T. 33; R. T. 24.]

III.

Specification of Error.

The Appellant has in effect specified one error: That the Court erred in denying his motion to vacate his plea of guilty.

IV.

Statutes Involved.

Section 176(a) of Title 21 of the United States Code provides in pertinent part as follows:

> ". . . whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years . . ."

Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> "The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining

that the plea is made voluntarily with understanding of the nature of the charge."

Rule 32(d) of Federal Rules of Criminal Procedure provides as follows:

"A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Rule 41(e) of Federal Rules of Criminal Procedure provides in pertinent part as follows:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized from the return of the property and to suppress for use as evidence anything so obtained . . . The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

V.
ARGUMENT.

A. The Action of the District Court in Denying the Motion to Vacate the Plea of Guilty Did Not Constitute an Abuse of Discretion Under the Circumstances of This Case.

At the outset it should be noted that the cases hold that the denial of a motion to withdraw a plea of guilty, whether made before or after sentence, is reversible only if it appears there has been an abuse of discretion.

United States v. Lester, 247 F. 2d 496, 500 (2nd Cir. 1957);

Richardson v. United States, 217 F. 2d 696, 699 (8th Cir. 1954);

Friedman v. United States, 200 F. 2d 690 (8th Cir. 1952), cert. den. 345 U. S. 926; reh. den. 345 U. S. 961.

The cases cited by Appellant appear to be primarily concerned with whether or not the circumstances under which a plea of guilty was entered, particularly where counsel was waived, disclosed that such a plea was made voluntarily with understanding of the nature of the charge as required by Federal Rule 11. Here, however, we have a case in which the sole purpose of the motion to vacate the plea is to assert a belated motion to suppress evidence after the proposed movant had testified voluntarily of his guilt at prior proceedings in behalf of his codefendant.

The motion was made with the following undisputed factual background:

First, Appellant was represented by counsel at every stage of the proceedings. Second, his initial plea of not

guilty was changed on Appellant's motion at the time the matter was due to be set for trial as to himself and the other party charged in the indictment. Third, the Appellant raised by his motion to vacate his plea an issue not of his innocence of the charge, but an issue of whether he should be allowed to attempt to prevent by further proceedings certain evidence from being admitted against him. Had Appellant allowed his initial plea of not guilty to stand, he would have had to raise such an issue prior to, or certainly during, the trial which occurred twelve days prior to the time he subsequently made the motion to vacate his plea of guilty. See Rule 41(e), *supra.*

Turning to the cases cited by Appellant in his Brief, it is respectfully submitted that each of these authorities is easily distinguished from the facts involved in the instant appeal.

United States v. Lester, supra, primarily relied upon by Appellant, was a case where a plea of guilty had been made without counsel and a motion to vacate the plea had been denied by the District Court. The Court of Appeals held the Court had failed to ascertain whether the guilty plea was made with full understanding of likely consequences. The sole purpose of the remand to the District Court was to have said court determine whether defendant pleaded guilty reasonably relying on representations made by a prosecutor that a prison sentence would not be imposed. The Court further pointed out that the failure of the District Court to conduct a penetrating and comprehensive examination of all circumstances did not constitute reversible error absent a showing that defendant had been misled by the government.

The two cases quoted by Appellant in this case, *Von Moltke v. Gillies,* 332 U. S. 708 (1947), and *Smith v.*

United States, 238 F. 2d 925 (5th Cir. 1956), concerned cases in which the defendant was not represented by counsel at the time the plea of guilty was entered.

Von Moltke v. Gillies, supra, involved a plea of guilty entered to a conspiracy to violate the Espionage Act. The Supreme Court remanded the case to the District Court to hold hearings and make findings on the question of whether petitioner pleaded guilty in reliance of erroneous legal advice of a government agent, and to release her from further custody under the plea if said court found that petitioner did not completely, intelligently and with full understanding of the implications, waive her constitutional right to counsel.

Smith v. United States, supra, involved a defendant who had waived counsel and indictment and was sentenced to thirty years imprisonment on a plea of guilty. The Court of Appeals held that the evidence on the hearing under Section 2255 of Title 28, United States Code, required a finding of denial of due process.

Bergen v. United States, 145 F. 2d 181 (8th Cir. 1944), concerned a motion to withdraw plea of guilty which had been entered to a complex conspiracy case. The Court seems to emphasize the fact that the plea was made without counsel, and acknowledges that the motion was within the discretion of the District Court. It should be noted that here defendant took his initial course on his own initiative and the request to withdraw his plea appears to have been made after consultation with counsel. The Court indicated that the question there to be considered was whether at the time of the entry of his plea defendant had the requisite understanding of the charges against him and held that under the facts he did not.

Kercheval v. United States, 274 U. S. 220 (1927), decided that a plea of guilty withdrawn by leave of Court was not admissible on the trial of the issue arising on the substituted plea of not guilty. The statement of court cited by Appellant was made in connection with the particular issue of admissible evidence involved there which did not concern whether or not the plea of guilty should have been withdrawn.

McJordan v. Huff, 133 F. 2d 408 (D. C. 1943), refers to a possible change of plea at time of arraignment, as a matter of course, but held that the appointment of counsel after arraignment but before sentence did not infringe on petitioner's constitutional rights and denied petition for writ of habeas corpus.

It would appear on the face of the record from Appellant's subsequent voluntary testimony of his guilt that by his initial plea of not guilty all other possible defenses were fully considered by the time he charted his course by changing his plea of guilty when the case was due to be set for trial. The affidavit of Appellant is not explicit as to which facts reoccurred to him and as to what facts he claims were not initially disclosed to his counsel. Certainly the facts surrounding the charge would have been fresher in Appellant's mind during the time the plea to the charge was considered than at any subsequent date. The entire circumstances fully support the finding placing no credence in Appellant's claim that he pleaded guilty under a misapprehension of his rights or because he was confused as to any facts.

The facts assumed by Appellant of an illegal search and seizure pose the same question decided by the case of *United States v. Sturm*, 180 F. 2d 413 (7th Cir. 1950), cert. den. 70 S. Ct. 1008, which was properly considered by the District Court as being applicable to this case.

The argument that an alleged illegal search and seizure, being a violation of a right guaranteed by the Constitution, vitiated a plea of guilty, was made in that case.

There the facts, admitted *arguendo,* showed an arrest and search and seizure by Federal agents of certain property in defendant's room. Following this arrest and shortly after arraignment by a United States Commissioner, the defendant in that case procured the services of an attorney who represented him throughout all the subsequent proceedings. In these later proceedings, the defendant waived Indictment, consented to disposition of the case in the district of apprehension and pleaded guilty to three Informations charging Federal offense. He thereafter moved the District Court to vacate the sentences, claiming that the arrest was illegal and the guaranty against reasonable searches and seizures was violated.

The Court of Appeals, in affirming the District Court, pointed out that the contention of defendant that this alleged violation of his constitutional right automatically deprived the Court of jurisdiction to receive his plea of guilty could not be maintained because there was no causal relationship to his conviction, in that defendant had entered a plea of guilty and the evidence obtained was not used against him.

Referring to the contention of defendant that, "although a plea of guilty ordinarily constitutes an admission of guilt and waiver of trial and the rights incidental thereto, it does not have this effect if made while the accused is under a misapprehension of the facts and his rights," the Court pointed out that the conclusive answer to this contention was that defendant was represented by counsel throughout the proceedings.

Edwards v. United States, 256 F. 2d 707 (D. C., 1958), points out that even a claim of ineffective assistance of counsel in an effort to impeach a plea of guilty is immaterial except perhaps to the extent it bears on the issues of the voluntariness and understanding with which plea was made. It was further stated in this case that "understandingly" refers to the meaning of the charge, what acts amount to being guilty of the charge and the consequences of pleading guilty thereto, rather than to dilatory or evidentiary defenses.

It is submitted the record here amply supports the finding that the plea of guilty was voluntarily and understandingly made and that the denial of the motion to vacate said plea was not an abuse of discretion requiring reversal of the conviction.

B. The Failure to Allow Oral Argument on the Motion to Vacate Plea of Guilty Did Not Constitute Error.

Appellant has in effect specified as a second point of error the failure to allow any oral argument on the motion to vacate plea of guilty. However, the argument of Appellant on this point is directed to the applicability of the case of *United States v. Sturm, supra,* to the facts of this case, rather than to any showing of error resulting from the trial court's action. Nor does the record show an objection was made that failure to allow oral argument, in addition to the written argument filed by Appellant, was prejudicial error. The pertinent portion of the record at this point is as follows:

> "Mr. Leeger: That is right. I received Mr. Enstrom's brief yesterday morning, and I filed an answering brief yesterday afternoon.

According to the ruling there will be no further argument permitted; is that right, sir?

The Court: Whatever I said is in the record, Mr. Leeger. You heard it, did you not?

Mr. Leeger: Yes, I did.

The Court: That is all I have to say in the matter. I said I don't require any argument.

Mr. Leeger: Very well, sir."

"It is only where an error is seriously prejudicial that it will be noticed in the absence of objection."

Himmelfarb v. United States, 175 F. 2d 924, 950 (9th Cir. 1949), cert. den., 338 U. S. 860.

Rule 52(a) of the Federal Rules of Procedure provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

It is submitted that the failure to allow oral argument in this matter which had been briefed in writing was at the most a variance in procedure which should be disregarded.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of guilty in the Court below should be affirmed.

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